FILE COPY

Office - Supreme Court
FILED
APR 18 195
CHARLES ELMORE CR

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 733.

THE CHARTER OAK FIRE INSURANCE COMPANY and UNITED STATES FIRE INSURANCE COMPANY OF NEW YORK,
Petitioners,

v.

HARRY J. GERRITY and BLANCHE HUNT GERRITY,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

WILLIAM E. LEAHY,
Bowen Building,
Washington, D. C.,

RAYMOND F. GARRITY,
Tower Building,
Washington, D. C.,
Attorneys for Respondents.

April, 1950.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

Page

Opinions of Courts Below 1

Jurisdiction 1

Counter-Statement 2

Argument:

I. No question of sufficient general importance is presented by petitioners to warrant certiorari to the United States Court of Appeals for the District of Columbia Circuit 3

II. No real conflict exists between the decision of the Eighth Circuit Court of Appeals in *Davies* v. *Hartford Fire Ins. Co.*, 75 F. (2d) 442, and the decision of the District Court, affirmed herein *per curiam* by the Court of Appeals for the District of Columbia Circuit 5

III. The inherent explosion clause in the respondents' insurance policies clearly covers the loss caused by explosion under the facts and circumstances involved herein 8

Conclusion 11

CASES CITED.

Davies v. *Hartford Fire Ins. Co.*, 75 F. (2d) 442.....2, 4, 5

Pierce Oil Corp. v. *Hope*, 248 U. S. 498, 63 L. Ed. 381 8

Sargent v. *Mechanics Insurance Co.*, 216 Iowa 688...4, 7, 9

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 733.

THE CHARTER OAK FIRE INSURANCE COMPANY and UNITED STATES FIRE INSURANCE COMPANY OF NEW YORK,
Petitioners,

v.

HARRY J. GERRITY and BLANCHE HUNT GERRITY,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINIONS OF COURTS BELOW.

The District Court opinion is reported in 82 F. Supp. 631. It is also printed at R. 47-52; and the Court's Findings of Fact and Conclusions of Law are at R. 52-55.

Argument was had in the Court of Appeals on February 9, 1950; and that Court rendered a *per curiam* opinion on February 20th (R. 58), which is not yet officially reported.

JURISDICTION.

Petitioners invoke Section 1254(1), Title 28, United States Code, in applying for the issuance of a writ of certiorari.

COUNTER-STATEMENT.

Petitioners' Summary (Br. 3-5) and Statement of the Case (Br. 11-13) contain certain inaccuracies and omissions. Without attempting to point them all out, the respondents respectfully request the Court to examine the Agreed Statement of Facts (R. 8-15), upon which the cases were submitted to the District Court. There was no testimony or other evidence submitted by either party. The Agreed Statement of Facts disclosed all known facts which bore upon the question of liability of the petitioners herein; and it was prepared and agreed upon by both counsel for all parties hereto.

Petitioners state (Br. 4) that the District Court's finding of fact number 5 (R. 54) is not disputed. The District Court therein found that the explosion was caused by the escape of gas from the pipe after the valve was withdrawn and by the gas becoming ignited by one of the pilot lights. It also should be noted that in its finding of fact number 6 (R. 54) the District Court found that—

> "6. The explosion was not caused purposely or maliciously by anyone, with intent to destroy the house and its contents or for any purpose, and the plaintiffs neither caused nor had any knowledge of the explosion or any event leading up thereto until after its occurrence."

Nowhere in the Agreed Statement of Facts (R. 8-15), or in the Findings of Fact by the District Court (R. 52-55), is there any evidence or finding of a deliberate and intentional attempt to destroy the respondents' house and its contents; and petitioners are quite inaccurate in stating (R. 4) that "on similar facts" recovery was denied under an inherent explosion clause in *Davies* v. *Hartford Fire Insurance Co.*, 75 F. (2d) 442.

Likewise, petitioners are in error in stating (Br. 5, 7, 16) that the District Court held, contrary to the *Davies Case*, that the very presence of gas in the home was alone a

"hazard inherent therein" (R. 50). What the District Court held was that "any system of apparatus for supplying illuminating gas" created the risk or possibility of an accidental explosion, and that, "The appliances formed part of the insured property and, therefore, this possibility was a 'hazard inherent therein'." (R. 50.) The facts in the *Davies Case,* and more especially the language and scope of the inherent explosion clause, are distinctly dissimilar to those involved in the instant cases. Hence, that case is clearly distinguishable, as we shall later show. The Court of Appeals and the District Court below have so decided.

ARGUMENT.

I.

No Question of Sufficient General Importance is Presented by Petitioners to Warrant Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

Petitioners endeavor under Point III (Br. 8-9, 23-26) to impress upon the Court that the question presented herein is one of "national importance". (Br. 9.) They have gone outside the record; and we think that the inclusion of the material in the Appendix (Br. 27-30) is quite inappropriate, to say the least. Rule 38(5)(c) refers to cases "Where the United States Court of Appeals for the District of Columbia has decided a question of general importance, * * * which has not been, but should be, settled by this court." We submit that no such case as this can reasonably be within the contemplation of the aforesaid rule.

The inherent explosion clause did not become a part of fire insurance policies in the District of Columbia until about January, 1945. In a tabular comparison (Br. 25) petitioners show that the present form or language of the inherent explosion clause differs from that in use in 1946, when respondents suffered loss by explosion. If necessary to protect petitioners in the future the language of the

inherent explosion clause can be changed again, if they and other fire insurance companies do not wish to accept the decision of the Courts below in the instant cases as a precedent. Changes in existing or outstanding policies can lawfully be made by the underwriters at any time when policies are renewed, usually in one year, or three years. If it is desired to exclude all gas explosions as inherent hazards such a provision can be included in the "exclusory" phrase of the inherent explosion clause.

The policy involved in *Davies* v. *Hartford Fire Insurance Co.*, 75 F. (2d) 442, was issued on December 1, 1931. The language of the inherent explosion clause there involved is exactly like that involved in the case of *Sargent* v. *Mechanics Insurance Co.*, 216 Iowa 688. The *Davies Case* was decided on February 14, 1935,—the *Sargent Case* on March 14, 1933. It should be noted that the opinion in the *Davies Case* does not even mention or cite the *Sargent Case*, decided by the Supreme Court of Iowa nearly two years earlier. If these decisions were in conflict (and they surely were not, because of the differing factual situations involved), a petition for a writ of certiorari to this Court might have been filed in the *Davies Case*. That was fifteen years ago. No other court cases involving an inherent explosion clause have been found by the able counsel for petitioners.

It is a fair inference, we think, that losses under the older or newer types of the inherent explosion clause are paid and settled by most fire insurance companies without litigation. It is common knowledge that there are hundreds of gas explosions in dwellings throughout the country each year. Over a period of twenty years there is a paucity of litigation involving the inherent explosion clause in any form. Petitioners do not state the year when the inherent explosion clause became a part of fire insurance policies in the forty-three States listed at Br. 24, but the *Davies* and *Sargent Cases* disclose that in South Dakota and Iowa such coverage was furnished without additional cost nearly

twenty years ago. In New York, the inherent explosion clause is apparently limited to business properties; e.g., "from the hazards inherent in the business as conducted therein and not otherwise" (Br. 29).

The law of insurance is mainly a question of contract terms, all of which are matters controlled by the insurance companies themselves. It does not require the exercise of jurisdiction by this Court upon certiorari to properly interpret the meaning or application of such a provision in fire insurance policies as that involved herein. The State courts or the lower Federal courts are fully able to resolve such questions of interpretation under the varying factual circumstances which every explosion loss involves.

II.

No Real Conflict Exists Between the Decision of the Eighth Circuit Court of Appeals in Davies v. Hartford Fire Insurance Co., 75 F. (2d) 442, and the Decision of the District Court, Affirmed Herein Per Curiam by the Court of Appeals for the District of Columbia Circuit.

The Court will readily recognize that all explosions, at all times, have a background of varying facts and circumstances. On the facts no two cases are likely to be alike or even similar. In the lower Courts, the respondents maintained that no other conclusion than that of liability upon the part of the petitioners could have been reached on the basis of the facts and circumstances as stipulated. The District Court gave no consideration to the matter of Extended Coverage. It is nowhere mentioned in the Court's opinion (R. 47-52) or the Findings of Fact (R. 52-55).

The Courts below did not repudiate or disregard the decision of the Eighth Circuit Court of Appeals in *Davies* v. *Hartford Fire Insurance Co.*, 75 F. (2d) 442. Their view of the scope of that case does not merit a further review of the instant matter in this Court. The facts in both cases are different. The terms of the inherent explosion clause in

both cases are different. The scope or application of any court decision is to be determined by the facts and the law involved therein. The *Davies Case* was not intended to lay down any general rule for all future cases. Counsel for petitioners distort the true scope of the opinion in the *Davies Case;* and also place undue emphasis upon isolated facts, involved in the instant cases, out of the context and fair meaning of the Agreed Statement. Some factual statements (Br. 19, 20) have no support whatever in the Agreed Statement and are not found therein. Counsel improperly state that, "The core could not drop or fall out; in order to be removed, it had to be jarred loose and manually, with conscious effort, pushed or pulled from its position in the valve" (Br. 20). The record is devoid of any such factual evidence.

The District Court, in its opinion (R. 51) stated:

> "The *Davies* case, therefore, by no means governs the case at bar. Here no basis exists for any finding that the explosion was purposely or maliciously caused with intent to destroy the house and its contents."

The important fact in the *Davies Case, supra,* is stated in the opinion, as follows:

> "The explosion was purposely and maliciously caused by a person or persons unknown to the insured, *intending to destroy the house and its contents.*" (Italics supplied.)

The Eighth Circuit Court of Appeals also stated:

> "The explosion coverage was limited to losses caused by explosions resulting from *hazards inherent in the occupancy* of the premises as a dwelling house, * * *. It is not necessary to determine what kinds of explosions would be covered by the rider. The rider was never intended to cover, and clearly does not cover, an explosion *resulting from a deliberate attempt of some person, either known or unknown, to destroy the insured premises.*" (Italics supplied.)

The three sentences from the *Davies Case* opinion, as quoted by petitioners (Br. 6, 18), are taken out of their true context and do not reflect the holding of the Eighth Circuit Court of Appeals. The lower Courts in the instant matter clearly and definitely distinguished the *Davies Case* as follows (R. 51):

> "Another consideration that deserves attention is that in the *Davies* case, the explosion rider covered explosions resulting from 'hazards inherent in the occupancy'. In the instant case the clause covers 'hazards inherent in the dwelling'. The former relates to hazards arising out of the occupancy. The latter, *which is much broader,* relates to hazards inherent in the structure itself." (Italics supplied.)

Petitioners are not justified in arguing (Br. 17) that the nub of the court's holding in the *Davies Case* "was the fact of a deliberate diversion of gas from its intended domestic use", without relating this fact to the express terms of the policy, under which "coverage was limited to losses caused by explosions resulting from hazards inherent in the occupancy of the premises as a dwelling house." There is no conflict between the decisions of the lower Courts herein, and the ruling in the *Davies Case,* on the theory that the very presence of gas (natural or manufactured) in the home is *per se* an inherent hazard. The Courts below (Br. 16) held that any system of apparatus for supplying illuminating gas, and the "appliances" forming part of the insured property, was a hazard inherent therein, which might create the possibility or risk of an accidental explosion, no matter how remote.

Petitioners state (Br. 12) that in *Sargent* v. *Mechanics Insurance Co.,* 216 Iowa 688, "an unexplained explosion *within* a heating furnace was held to have occurred from an inherent hazard." This is not quite accurate, because the Supreme Court of Iowa stated (page 693) that an explosion "occurred in the furnace, * * * a hazard certainly inherent in the occupancy." Some one (the insured's son-

in-law) fixed or tampered with the furnace improperly. Unlike the facts in the *Davies Case,* the facts in the *Sargent Case* were within the scope of the normal use and occupancy of the premises; and there was no evidence of an intent to destroy the house and its contents. Just as the *Sargent Case* is different, and distinguishable, from the *Davies Case,* so the instant cases are no more in conflict with the *Davies Case* than that case was in conflict with the *Sargent Case.*

We submit, there is no real conflict between the holding of the Courts below, and the Eighth Circuit Court of Appeals, because the terms of the inherent explosion clauses are different in each case. In our opinion, however, the *Davies Case* was wrongly decided, if the inherent explosion clause in that case was the same as here, viz., "from hazards inherent therein". This, however, is not the question presented by the petition herein.

Apparently, what the petitioners ask this Court to do, is to broaden the scope of the decision in the *Davies Case, supra,* and, in effect, to re-write for them and other fire insurance companies the clear and unambiguous terms and provisions of the so-called inherent explosion clause,—often of doubtful application under the varying facts and circumstances which accompany all gas explosions.

III.

The Inherent Explosion Clause in the Respondents' Insurance Policies Clearly Covers the Loss Caused by Explosion Under the Facts and Circumstances Involved Herein.

The three fire insurance policies involved herein are in fact combination fire *and* explosion policies. We submit, that a loss caused by an explosion occurring within a dwelling is, of necessity, from a hazard inherent therein. The fact that an explosion has occurred pre-supposes that there was a pre-existing explosion hazard within the dwelling. As Mr. Justice Holmes said in *Pierce Oil Corp.* v. *Hope,* 248 U.S. 498, 63 L. Ed. 381: "We may take judicial notice

that disastrous explosions have occurred for which no satisfactory explanations have been offered. The unexpected happens."

If a coal furnace is a hazard inherent in the *occupancy* of a dwelling (*Sargent* v. *Mechanics Insurance Co.*, 216 Iowa 688), then it is also a hazard "inherent therein," within the meaning and intent of the inherent explosion clause in the policies of respondents. The explosion in the instant cases was from gas, and the "hazards inherent" in the dwelling must necessarily include the gas pipes or conduits, valves, meters, and other apparatus for conveying the gas to the furnace,—as well as the furnace itself.

Gas in pipes is an explosion hazard inherent in all dwellings. Whether properly confined or not, the hazard of explosion is potential, at least. By its very nature, gas is an explosive force. The language of the inherent explosion clause contemplates both latent and patent hazards. A mysterious or inexplainable explosion should be regarded as arising from an inherent though perhaps latent hazard. Normally a patent or obvious explosion hazard will call for special explosion insurance. An explosion policy, so-called, is well known in insurance circles.

If a person uses or misuses a kitchen gas range, and an explosion results, then clearly under the provisions of fire insurance policies containing the inherent explosion clause, such as here involved, the explosion must be deemed to result from a hazard inherent in the dwelling. The District Court aptly observed (R. 50) that: " 'Hazards inherent therein' are by no means limited to spontaneous explosions. If this were the case, the clause would not be of very much value."

A leaking gas pipe must be regarded as an inherent hazard. An automobile with gasoline in the tank is an inherent hazard in a dwelling where there is a basement garage. A fuel oil tank supplying a furnace is also an inherent hazard. Gas accumulating in a coal furnace is explosive; and the furnace is an inherent hazard, as held in the *Sargent*

Case, supra. It is commonly recognized that gas in a kitchen stove is an explosion hazard. Electricity in a dwelling is *both* a fire and an explosion hazard inherent therein. If gas seeps into a basement or cellar, and causes an explosion, this would be an inherent hazard.

It is only fair to infer that the possibility or probability of explosion was contemplated by the petitioners and respondents, otherwise the inherent explosion clause would be meaningless. The language used refers to something that would or might explode,—or the sort of explosion hazards which inhere in all dwellings. An unused coal furnace will not explode, but when in use it is clearly an explosion hazard. Inherent hazards may exist which never result in an explosion.

In the Court of Appeals, the petitioners argued that "There is an inherent hazard in practically everything but most things are not inherently hazardous unless wrongfully used, * * *." That is, of course, the very reason for obtaining insurance protection. The exclusory language in the inherent explosion clause is some indication of the kinds of inherent hazards which the insurers (petitioners) had in mind. This language indicates that they *only intended to exclude* explosions caused *by steam* in boilers, pipes, turbines and engines, etc.

Therefore, it is reasonable to conclude that all other kinds of inherent hazards are covered under the inherent explosion clause. Also, this clearly implies that such explosions would necessarily be from hazards inherent in the dwelling. If it were intended to exclude a gas explosion, the word "gas" could have been included as part of the exclusory provisions of the inherent explosion clause.

It is erroneous for the petitioners to contend that the *Davies Case* holds that a gas explosion, whatever its origin, would not be within the coverage of the inherent explosion clause, especially under the much broader coverage provisions contained in the clause as herein involved.

CONCLUSION.

For the foregoing reasons, it is respectfully requested that the petition for a writ of certiorari be denied.

Respectfully submitted,

WILLIAM E. LEAHY,
Bowen Building,
Washington, D. C.,

RAYMOND F. GARRITY,
Tower Building,
Washington, D. C.,
Attorneys for Respondents.

April, 1950.